

1831762 (Migration) [2019] AATA 3762 (26 April 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1831762

MEMBER: Meredith Jackson

DATE: 26 April 2019

PLACE OF DECISION: Brisbane

DECISION: The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Statement made on 26 April 2019 at 1:32pm

CATCHWORDS

MIGRATION – cancellation – Student (Temporary) (Class TU) visa – Subclass 500 – ceased to be member of visa holder's family unit – ceased to be in ongoing relationship with wife – marital issues – family violence allegations – applicant disputes information wife provided department – mental health issues – young family – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5, 116, 359AA, 375A
Migration Regulations 1994(Cth), r 1.12, Schedule 2, 500.2

CASES

MIMA v Zhang (1999) 84 FCR 258

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

SUMMARY

1. This is an application for review of a decision dated 24 October 2018 made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 500 (Student) visa under s.116 of the *Migration Act 1958* (the Act).
2. The applicant Mr [A], is legally married to Ms [B]. His TU500 visa was granted on 7 November 2016 under the secondary family criteria by reason of him being a member of Ms [B]'s family unit at the time of the grant. The delegate cancelled the visa on 24 October 2018 under s.116(1)(a) of the Act, because as of that date, the applicant had ceased to be a member of [B]'s family unit. In this review, the Tribunal must decide whether that ground for cancellation is made out, and if so, whether the proper exercise of its discretion requires the visa to be cancelled.
3. The applicant appeared before the Tribunal on 13 March 2019 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hindi and English languages.
4. The Tribunal also heard evidence from witness [the applicant's sibling]. The applicant was represented in relation to the review by his registered migration agent, who attended the hearing.
5. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

6. Evidence before the Tribunal

7. The delegate's decision record, which the applicant gave the Tribunal in the review, recorded the following:
 - a) The applicant was granted a Student (subclass 500) visa on the basis of his spousal relationship with [Ms B], who satisfied the primary criteria in cl.500.2 of Schedule 2 of the *Migration Regulations 1994* (the Regulations). The applicant was granted the visa as a dependant applicant on [Ms B]'s Student (subclass 500) visa. Under s.116 of the Act, the Minister may cancel a visa if he or she is satisfied that certain grounds specified in that provision are made out. Relevantly, to this case, these include the ground set out in s.116(1)(a) If satisfied that the ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy;
 - b) As the visa holder has ceased to be in an ongoing relationship with [Ms B], the visa holder has ceased to be either a spouse or a de facto partner of that person as defined respectively by sections 5F and 5CB of the Act. As such the visa holder has ceased to be a member of that person's family unit as prescribed by r.1.12 of the Regulations. If this is correct, the visa holder's visa may be cancelled under s.116(1)(a) which set out the following ground for cancellation: subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that (a) the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or that no longer exists;

- c) On 22 August 2018 the department sent the applicant a Notice of Intention to Consider Cancellation (NOICC) of his visa and invited him to respond in writing;
 - d) The visa holder in his response to the NOICC did not state whether he agreed or disagreed that there are grounds for cancellation;
 - e) That based on the information before the delegate, the delegate was satisfied as to a ground for cancellation under *paragraph(s) 116(1)(a) – fact/circumstance no longer exists*.
8. On 3 September 2018 the visa holder's appointed migration agent provided a response to the NOICC on the visa holder's behalf. It stated in summary:
- a) The applicant arrived in Australia in November 2016 as a dependent of his wife's Student visa.
 - b) The applicant's wife failed her [studies] and wanted to return to India.
 - c) The applicant did not support his wife's travel to India as he wanted her to remain in Australia to continue her studies.
 - d) Their marital conflict on one occasion resulted to neighbours reporting to Police.
 - e) [In] February 2017 the applicant's wife left their home and when she did not return, "after a few days", he reported her missing.
 - f) [In] March 2017 his wife travelled with their child to India without him knowing.
 - g) During their cohabitation, his parents paid for living expenses as well as his wife's tuition fees. He felt time and money was wasted whilst his wife was in India.
 - h) [In] September 2017, his wife returned to Australia, leaving their child with his parents in India. He and his wife resumed cohabitation but continued to have marital issues. He was threatened by his wife that he would be removed as a dependent of her visa. His wife would [threaten] to call the police based on family violence.
 - i) His mental health suffered and sought the assistance of a psychologist.
 - j) He decided to pursue studies [and] lodged his own Student visa application.
 - k) His Student visa application was refused by the department.
 - l) He remained in the home with his wife, [Ms B] until [April] 2018, when he left.
 - m) He considers [Ms B] gave misleading and wrong information to the Department in stating that her relationship with the visa holder had ended since at least [March] 2017, because she had been in the relationship until [April] 2018 when he left the house, and this is made clear because she had deposited her pay in their joint account until [March] 2018, continued to pay rent from the account and lodged a missing person's complaint about him [in] May 2018.

9. The applicant provided supporting documents to the department, including:
- a) [Bank] statement for Mr. [A]
 - b) [Bank] statement for joint bank account for Mr. [A] and Mrs [B]
 - c) [Bank] statement for joint bank account for [Mr A] and [Ms B]
 - d) Receipt of Tuition fee payment dated [March] 2018 paid by [Ms B]
 - e) Receipt of Tuition fee payment dated [March] 2018 paid by [the applicant's sibling].
 - f) Receipt of Tuition fee payment dated [in] September paid by personal account.
 - g) Clinical Psychologist report for [Mr A] dated [in] June 2018.
 - h) Invoice receipt issued by [named company] dated [in] September 2017 paid by [named person].
 - i) Flight itinerary for Ms [B].
 - j) Rent summary.
10. On 24 October 2018 the delegate cancelled the visa.
11. *The hearing*
12. The Tribunal hearing proceeded on 13 March 2019. The applicant attended the hearing and supplemented his written submissions by way of oral evidence and submissions. The applicant said the following:
- a) His current living arrangement is that he lives alone and separate from his wife and not resident with his wife;
 - b) He is not in any way dependent on his wife including for income;
 - c) His wife had given to the department the date [in] March 2017 as the date he was no longer part of her family but they lived together until [April] 2018;
 - d) When they came from India to study [his] wife failed her course; she didn't want to study and [details deleted]; he reported this to the Police so he could feel safe; she was "torturing" him because he was on her visa;
 - e) Police conducted a welfare check [in] April 2018, she was fighting with the applicant that day and he left home that day; he went to the Police [and] then to a friend's house;
 - f) After that he was talking paying the rent at his wife's premises until [June] 2018 when he ceased paying the rent; he had not been back since [April] 2018, he was scared and feeling unsafe.
13. *Information covered under certificate issued under s.375A of the Act*
14. The Tribunal put to the applicant that certain information provided to the department was covered by a certificate issued under s.375A of the Act. The Tribunal gave a copy of

the certificate to the applicant and asked if the applicant considered it to be a valid certificate. The Tribunal said that if the certificate is valid, the Tribunal has a discretion or choice as to whether it releases the material (except in certain circumstances) to the applicant. The Tribunal said the certificate was issued by a delegate of the Minister and it specifies a reason why disclosure of the information would be contrary to the public interest. The Tribunal said if the applicant needed more time to consider the certificate the Tribunal would consider that. The applicant said he did not understand the role of the certificate, and covered information it would put to the applicant. The Tribunal considered the information to be relevant to the issues it was considering. The information, put under section 359AA of the Act, would, subject to the applicant's comments or response, be the reason or part of the reason for affirming the decision under review to cancel the visa. This did not mean the Tribunal had made up its mind, it wanted to take into account any comments the applicant wanted to make. The applicant did not ask for more time. The Tribunal put the gist of the information to the applicant, which was that the applicant hurt his wife many times, there were altercations at his home and after some time he had agreed to separate from his wife. The information was relevant because it might cast doubt on whether the applicant was in a genuine and continuing relationship with his wife. The Tribunal had not reached that conclusion but if it were to do so, then subject to his comments or response, it would affirm the decision to cancel the visa. The applicant responded as follows:

- a) The applicant was not living with his wife now; he had no relations with her; however according to the law he was not divorced and his family has been in touch with her;
- b) The applicant felt he needed to appeal the cancellation of his visa because the information his wife had given to the department was absolutely wrong; to say that he was not a member of the family from [March] 2017 was not true, he had lived with her after that until [April] 2018; and she had lodged a missing person's report about him [in] May 2018;
- c) In March his wife had gone to India with the child without informing him or responding to his calls or social media messages; in this period he had, until September 2017, lived with his [sibling]; his wife returned in September 2017 and lived with him; the child remained with his parents in India;
- d) He has not seen the child since March 2017; if he returned to India he would see her because she was living with his parents; and he would live with his parents if he returned;
- e) The applicant would suffer if he returned to India after a visa cancellation. He had come to Australia to support his family but through her actions she had destroyed his career and caused him depression; his wife had given the Department wrong information about him and put the same on social media, but he had never done anything violent; the information wrongly given to the Department had ruined his chances of getting study experience as no one would admit him in his visa circumstances; his wife had destroyed his employment prospects in India and cruelled his chances of taking care of his daughter;

15. In response to the Tribunal's question that he had submitted a psychologists' report which stated there was stress in the couple's life related to the goal of settling in Australia, the applicant said:

- a) He did not intend to settle in Australia, but would settle in India; if Australia had been his dream he would have done something on his own;
 - b) Neither he nor his wife had an intention to apply for visas other than Student visas;
 - c) His wife had no financial obligations to him or his family; he does not support the family now; he has no use for money now she has spoiled his career; he will need money however to repay his parents for looking after his daughter; he had also borrowed from his mother in India to support his wife's studies; his mother had taken out a loan she now had to repay;
 - d) How could he rebuild himself and sustain his daughter if he is in India with the child after this; how will he restart his life?
16. The Tribunal heard from [the] applicant's [sibling], who said, in summary:
- a) When issues arose, [the sibling] had encouraged [the applicant] to report to Police;
 - b) [The sibling] could not assess whether the breakdown was mutual, [the sibling] relied on what [the applicant] [said];
 - c) [The applicant] had suffered a lot and had sought medical help; he could start his career again but he needed to stabilise, but needed help; he would inevitably suffer in Indian culture because there would be a whole of family social impact from the breakdown and visa issues, he would have difficulty remarrying, for example.
17. *Documents provided to the Tribunal*
- a) A copy of a Police report dated [June] 2018 stating that a welfare check was carried out at the home [in] April 2018;
 - b) Medical certificates, a medical prescription for [Mr A];
 - c) A personal submission regarding the circumstances of the breakdown and separation;
 - d) Letter from a clinical psychologist referring to his marital strains and stating *"There seems to be ongoing stress in the couple's life elated to the goal of settling in Australia"* and marked *"Not for Court purposes"*.
 - e) Academic application and conditional offer documents from two higher education institutions for courses the applicant applied for; communications between one university and an education agency regarding a withdrawal of offer due to a *"visa risk"*;

Does the ground for cancellation exist?

18. Under s.116 of the Act, the Minister may cancel a visa if he is satisfied that certain grounds specified in that section are made out. Relevantly to this case, these include the ground set out in s.116(1)(a). If satisfied that the ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances which may include matters of government policy.

Under that sub-section, a visa may be cancelled if the Minister or the Tribunal is satisfied that the circumstances which permitted the grant of the visa no longer exist. The proper construction of s.116(1)(a) was discussed in detail by the Full Federal Court in *MIMA v Zhang* (1999) 84 FCR 258. Although considering a differently worded version of s.116(1)(a), the reasoning of the Court provides some guidance. The Court held that s.116(1)(a) is concerned with a material change in the circumstances (per Merkel J at [74]).

19. The applicant's visa was granted on the grounds that he was a member of Ms [B]'s family unit and therefore met the criteria set out in r. 1.12 of the Regulations. Relevantly, r.1.12(2)(a) provides that a person is a member of another's family unit within the meaning of s. 5(1) of the Act if the person is the other's spouse or de-facto partner. Section 5F(1) of the Act provides that a person is the spouse of another if both are in a married relationship. Section 5F(2) provides that the two people will be in a married relationship if the marriage is valid, they have a mutual commitment to a shared life as a married couple, the relationship between them is genuine and continuing, and they live together (or do not live separately on a permanent basis). All of those characteristics of the relationship must exist for the definition of a spouse under s. 5F to be satisfied.
20. The Tribunal has carefully considered the applicant's submissions and the circumstances of the parties as indicated in the applicant's evidence and on the papers before it, with a view to whether the characteristics of the relationship satisfy the requirements of s.5F. The Tribunal accepts that the parties are validly married, but is not convinced that, at the time of this decision, they have a mutual commitment to a shared life as a married couple; that the relationship between them is genuine and continuing; and that they live together and not separately and apart on a permanent basis.
21. The Tribunal acknowledges the applicant's claim that Ms [B] misled the Department in stating that the two had not lived together since [March] 2018. The Tribunal notes the applicant's counter arguments and submissions, which provide some evidence that the living arrangement did continue until he left the house [in] April 2018. The Tribunal considers that either perspective might be construed as true, but considers that for the purposes of this decision, the date of the separation matters less than the fact of the parties living separately and apart now. The applicant does not claim any likelihood of the relationship being reinstated.
22. The Tribunal is satisfied the applicant is not a member of Ms [B]'s family unit at the time of this decision the circumstances of the relationship do not satisfy the requirements of s.5F, and therefore the applicant does not meet the r.1.12(2)(a).
23. The applicant's visa was granted on the secondary family criteria by reason of the applicant being a member of Ms [B]'s family unit at the time of the grant, Ms [B] having satisfied the primary criteria in cl.500.2 of the Regulations. Given that the Tribunal is satisfied the applicant is no longer a member of Ms [B]'s family unit as defined, the Tribunal is satisfied that the ground for cancellation in s.116(1)(a) exists. As that ground does not require mandatory cancellation under s.116(3), the Tribunal must proceed to consider whether the visa should be cancelled.
24. *The discretion*
25. The Act and the Regulations do not prescribe the matters to be considered in the exercise of this discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant, and matters in the Department's Procedures Advice Manual (PAM3) 'General visa cancellation powers'.
26. *The purpose of the applicant's travel to and stay in Australia*

27. The applicant was granted his Student visa on the basis of being a member of the family unit of Ms [B]. He submits the purpose of his travel to and stay in Australia was as a student dependent, in order to be with his wife and to support her in her studies. Although the applicant is still married to Ms [B] in that they are yet to divorce, his relationship with her does not currently constitute one of a shared commitment as husband and wife. The parties are separated, with the child living with the applicant's parents in India. The parties do not meet the requirements of s.5F of the Act, as the Tribunal concludes in paragraphs 21 and 22, above. The purpose of the applicant's continued stay in Australia under the secondary TU500 visa has for now at least ceased to exist. The Tribunal affords this consideration no weight in the applicant's favour.
28. *The circumstances in which the ground for cancellation arose*
29. The delegate cancelled the applicant's visa because at the time of cancellation, on 24 October 2018, his relationship with Ms [B] as her husband was not continuing. The parties were not living together as husband and wife, they were separated.
30. The Tribunal has considered anew the circumstances in which the cancellation grounds arose, particularly the applicant's claims that difficulties experienced in his marriage were due to [a certain reason]. These claims rely heavily on his account of the marital issues that led to the separation in March 2017 or April 2018, which, in the broad, are that conflict arose after Ms [B] struggled with her [study]; she became angry and [reported] him for assaulting him; that Ms [B] left the house in March 2017, taking their young child to India without his knowledge, but returned to live with him until [April] 2018. The Tribunal notes that the applicant has not submitted supporting evidence [about a certain issue] and notes that information held by the department differs from this submission. Information held by the department, covered under the s.375A certificate, indicates that the applicant assaulted Ms [B] many times, there were altercations at the home and after some time he had agreed to separate from her. The Tribunal is not in a position to determine with any certainty how the conflict arose or played out; whether injuries were sustained and whether the circumstances were attributable to the actions of one party or the other. The Tribunal places little weight in the applicant's favour on this consideration.
31. *Extent of compliance with visa conditions and co-operation with the department*
32. On the evidence before the Tribunal, the applicant has not breached any condition of his visa. Further, he has cooperated with the department. For example, he did not ignore the notice of intention to cancel his visa. He responded to the notice promptly. The Tribunal places weight on this consideration in the applicant's favour.
33. *Hardship caused by the cancellation to the applicant and his family*
34. The applicant claims Ms [B] has ruined his future: that he has been unable to gain enrolment in Australia; is indebted to his mother for the funds she borrowed to invest in her daughter-in-law's studies; that he will struggle to gain employment and reignite a career in India; and he will be not be able to contain community perceptions in India and this will affect his chances of remarriage. His [sibling] submits the impact of the breakdown is certain to be far-reaching within his culture. There is some evidence that the cancellation process affected his study potential: the applicant provided a series of communications between an education agent and a [university] that had made him a conditional offer for a [program] but withdrew the offer on learning of his visa situation. The Tribunal has no supporting evidence before it in relation to money owed to his mother but accepts as credible, the applicant's claims in relation to the impact the breakdown in his family and community. There are some circumstances in his favour,

however: the Tribunal notes the applicant will return to India where his young daughter is in the custody of his parents and he will at least initially have considerable access to the child. The Tribunal accepts however the applicant will face some cultural, and possibly economic, hardship and affords these considerations some weight in his favour.

35. The Tribunal has weighed the potential hardships the applicant might experience in the initial period after his return to India, but considers they do not, on their own, provide justification for setting aside the delegate's decision. However, the Tribunal has taken account of them in reaching its conclusions.

Whether there are mandatory legal consequences, such as whether cancellation would result in the visa holder being unlawful and subject to detention, or whether indefinite detention is a possible consequence of cancellation, or whether there are provisions in the Act which prevent the person from making a valid visa application without the Minister's Intervention.

36. The applicant has not raised the issue of legal consequences arising from the cancellation, but the Tribunal has considered the impacts. The Tribunal accepts that if the applicant is forced to leave Australia, he will be prohibited from applying for most visas while he is onshore and may also be barred for applying for Australian temporary visas for three years. Further, that he may be subject to detention if he does not engage with the department after visa cancellation and voluntarily depart Australia. The applicant is currently on a Bridging visa because of this review process. In the absence of the applicant making another successful visa application, or the Minister granting a visa, ultimately he will not have authority to remain in Australia. If so, the applicant will have the opportunity to depart Australia. Whilst his continued failure to do so may ultimately result in detention or removal action, it is not a necessary consequence of the cancellation decision. Section 48 of the Act prescribes that a non-citizen who does not hold a substantive visa, and (relevantly) held a visa which was cancelled under s. 116 of the Act, may apply for certain prescribed classes of visas but not others. Regulation 2.12 prescribes the classes of visas, which does not include Student visas. Consequently, this limits the visa applications the applicant can make whilst onshore. The Tribunal affords these considerations some weight in the applicant's favour.

37. *Whether there are others whose visas would or may be cancelled under s. 140*

38. This consideration does not apply. The applicant is a secondary visa holder and the primary and other secondary visa holders' authority to remain in Australia is not affected by the cancellation decision.

39. *Whether any of Australia's international obligations, including non-refoulement and best interests of the children as a primary consideration, would be breached as a result of the cancellation*

40. In considering whether to exercise its discretion to cancel the applicant's visa, policy guidelines suggest that the tribunal should assess whether Australia would be in breach of its international obligations. These include the obligation in relation to non-refoulement pursuant to the *Refugees Convention* and the *Refugees Protocol*, Australia's responsibilities regarding the rights of any children pursuant to Article 3 of the *Convention on the Rights of the Child* (CRC), and the *International Covenant on Civil and Political Rights* (ICCPR). No claim was made and no information is before the Tribunal that a cancellation outcome would result in a breach of any of Australia's international obligations and the Tribunal affords this consideration no weight.

41. **Conclusion**

42. The applicant claims the circumstances leading up to the cancellation of his visa were as a result of his wife making false claims about him to Police and the Department. The Tribunal has carefully examined the applicant's claims that Ms [B] wilfully misled authorities. It notes the delegate's decision makes a reference to the Department having received, [in] March 2017, information from Ms [B] which advised that the relationship had ended. The applicant claims, however, it was sustained until [April] 2018. For the Tribunal, the fact of Ms [B] providing a false claim is not established. Ms [B] was absent from the house from March 2017 until September 2017 and while she returned to live in that dwelling for a time, paid rent and banked her pay in the joint account, it is not clear from the evidence before the Tribunal that the relationship met the specifications of the Act and Regulations in that period. Further, the Tribunal is not in a position to establish which of any claims of one party about the other in relation to alleged belligerence or [certain] incidents should be accepted as contributors to the breakdown. As indicated above, the Tribunal affords these considerations little weight in the applicant's favour.
43. The Tribunal has considered the applicant's claims regarding the hardship that he will suffer if his visa is cancelled. The Tribunal accepts that his prospects in Australia and in India are likely to be damaged by the events, and accepts the evidence of the applicant's [sibling] that the impact of family breakdowns and visa cancellations can be far-reaching in Indian culture. However the Tribunal notes the [sibling] did not place particular emphasis [about] the applicant's scope to resume a career. On balance, the Tribunal considers the cancellation will have an impact on the applicant's social conditions and is likely to disrupt his re-establishment for an initial period, but also considers that as an educated person, he has an opportunity to rebuild his life. The Tribunal grants this consideration some weight in the applicant's favour.
44. The Tribunal has considered the applicant's cooperation with the department and his compliance with visa conditions. It notes the submission of a clinical psychologist's letter which refers to the applicant and his wife having a *"goal of settling in Australia"*, however the Tribunal makes no finding about the assertion and places some weight on the applicant's cooperation with the department, in his favour.
45. The Tribunal places no weight on the remaining considerations, as described earlier in these reasons.
46. The Tribunal does not consider the combined weight of the individual elements that it weighs in the applicant's favour, or any of those elements alone, to be sufficient to justify setting aside the delegate's decision.
47. The Tribunal has insufficient evidence before it that the applicant is a member of Ms [B]'s family unit at the time of this decision. The applicant makes no claim for the potential for reconciliation and the Tribunal concludes it is unlikely. The relationship would need to be fully restored consistent with the definition in Section 5F of the Act and as described by r.1.12 of the Regulations to be considered viable.
48. The remaining reasons cited by the applicant for reinstatement of his visa are not consistent with the purpose of his original travel to Australia, the purpose for which the visa was granted, or the purpose of the Student visa scheme generally. He came to Australia as a member of the family unit of a person holding a Student visa. He is no longer a member of that family unit as defined.
49. Having regard to all the evidence before it, and balancing the matters in favour of setting aside the delegate's decision and affirming it, the Tribunal concludes that the correct and preferable exercise of its discretion favours affirming the delegate's decision to cancel the applicant's Student visa.

DECISION

50. The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Meredith Jackson
Member